Committee on Resources

Witness Statement

March 16, 2000

The Honorable Don Young, Chairman
Committee on Resources

Dear Representative Young:

Thank you for your invitation to appear and testify before the House Committee on Resources in connection with H.R. 3160, Common Sense Protections for Endangered Species Act of 2000, on Wednesday, March 1. Unfortunately, my schedule did not permit me to do so. However, I am submitting these comments, which I hope you and your Committee members will review and include in the hearing record in connection with this bill.

Two years ago the State of Maine entered in a five-year agreement with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the "Services") to implement a comprehensive conservation plan for the protection and restoration of Atlantic salmon. We are making steady and substantial progress under the plan. Despite our progress, only two years into that five-year plan, the Services abruptly changed course and decided to seek an endangered listing of Atlantic salmon in Maine. I strongly believe their decision to list is wrong and without justification, and undermines a promising partnership that is the best hope for protecting and restoring Atlantic salmon in Maine rivers.

I want to be clear about one thing at the outset - I am not opposed in any way to the Endangered Species Act itself. I consider myself to be a moderate, pro-environment Governor, and I recognize that the ESA has served an important role in preserving species literally on the brink of extinction like the California condor or the bald eagle. However laudable the underlying purposes of ESA may be, however, I believe the law is subject to abuse, and, in Maine's case at the moment, is being implemented in an arbitrary and heavy-handed fashion that is not consistent with Congress' original intent, sound science, or good public policy.

Many of the specific amendments proposed in H.R. 3160 make good sense. They might help to avoid the kind of negative, divisive experience that we in Maine are undergoing at the present time. Before addressing the bill specifically, let me give you a brief background of Maine's experience with implementation of the Endangered Species Act in connection with Atlantic salmon.

1. Background

In 1993, the Services received a petition to list under the ESA all Atlantic salmon throughout the United States. Following review of scientific and other evidence, they determined in 1995 that listing Atlantic salmon throughout the entire United States was not warranted because salmon had already been extirpated in some rivers and there was doubt as to the origin and genetic make up in many others rivers. However, the Services did propose to list as threatened certain subpopulations of Atlantic salmon found in seven Maine

rivers, based upon their conclusion that these salmon comprised a "Distinct Population Segment" (DPS) eligible for protection under the ESA.

In response to this proposed listing, I initiated an effort to develop a comprehensive plan to protect and restore Atlantic salmon in these rivers. Representatives of local, state, and federal governments, private industry, and interested non-governmental organizations worked for nearly two years to develop the plan. The Maine Atlantic Salmon Conservation Plan was launched in March 1997.

In December 1997, the Services concluded that Atlantic salmon were not threatened and withdrew the proposed rule in light of efforts being made to protect salmon in seven rivers under the Maine Conservation Plan. Interior Secretary Babbitt and Commerce Under Secretary Terry Garcia came to Maine and promoted this decision to withdraw the proposed threatened listing and support Maine's Conservation Plan as a landmark achievement showing the inherent flexibility of the ESA.

During the first two years of the five-year Maine Conservation Plan, the State of Maine together with its partners have made considerable progress. I am attaching a copy of the testimony delivered at a recent public hearing by a state official highlighting the progress made during this time.

Some ten months after the adoption of the Plan, however, notice of intent to bring a lawsuit against the Services was filed by Defenders of the Wildlife and other environmental groups contesting the December 1997 decision to withdraw the proposed threatened listing and requesting court intervention to order an immediate emergency listing of the salmon.

In January 1999, the State submitted its first annual report covering implementation of the Plan in 1998. The Services critiqued the State's annual report, setting out a number of concerns with the status of implementation efforts under the Plan. Four weeks later, the State provided a detailed response, and went to considerable effort to address each and every issue cited by the Services. As an example, two primary recommendations made by the Services were: (1) abolish the limited catch and release recreational fishing established under the Plan; and (2) tighten regulation of Maine's aquaculture industry. In both instances, Maine responded. The Maine Atlantic Salmon Commission has promulgated a rule prohibiting all recreational salmon fishing on all Maine rivers. State representatives met with representatives of the Services over the course of the summer and early fall of 1999 to negotiate detailed upgrades for aquaculture operations. When a near final draft of that agreement was sent to NOAA counsel in early October, the response the State received was that the Services had changed their mind and were now going to embark on a listing process.

Meanwhile, it appears that during the period that the State was attempting, in good faith, to address concerns raised in the Annual Report, the Services were preparing a new Status Review to serve as a basis for a re-initiated listing proposal. The lawsuit apparently pressured the Services to change course. Although completed by early July, the Status Review was not furnished to the State until after the decision to list had been made in the Fall, and even then, only after it was released to the press and third parties.

A pivotal issue in this case is whether the particular Atlantic salmon found in certain rivers constitute a DPS with the meaning of the ESA. The Services have based their DPS determination upon a 1999 scientific study authored principally by a federally employed scientist. This study has not been peer reviewed. The State initially sought access to the underlying data for these studies last November, but ultimately had to file a Freedom of Information Act request and then a federal lawsuit to get that data.

2. H.R. 3160 Offers Several Key Improvements to ESA that Will Make a Difference

a. Mandatory Standards for Defining "Species"

In the case of Atlantic salmon, the Services justify their listing proposed on the basis that salmon in certain Maine rivers constitute a subset of the large salmon population, or something called a "Distinct Population Segment" (DPS). The irony here is that there are literally thousands upon thousands of non-aquaculture Atlantic salmon in North American rivers and the Atlantic Ocean. Yet, the Services have isolated seven or eight rivers, and claim that the salmon in these rivers are genetically distinct from all others, and therefore merit protection. This position of river-specific distinctiveness is not, in our view, supported by sound science. What is worse, the salmon in these rivers (as well as others in Maine rivers) have been hybridized by massive, federally supported stocking programs over the last 120 years that stocked over one hundred million Atlantic salmon from as far away as Quebec into Maine rivers.

Congress expressly permits use of the DPS concept, however, it clearly recognized the "great potential for abuse" and accordingly instructed the Services to list such populations "sparingly and only when the biological evidence indicates that such action is warranted." S. Rep. No. 151, 96th Congress, First Session, at 7 (1979). In our case, though, the Services have played fast and loose with the DPS concept, and are disregarding their mandate to use it "sparingly."

Moreover, in the course of the Atlantic salmon listing process, they have changed the very rules regarding DPS several times. Initially, they determined there was a "Seven Rivers DPS" consisting of Atlantic salmon of unique river specific genetic heritage. Then, in 1997, they renamed the "Seven Rivers DPS" as the "Gulf of Maine DPS." In 1999, the Services changed the rules again by adding another stream, Cove Brook, to the original seven, and further by making all watersheds in the northern two-thirds of the State eligible for inclusion in the DPS, without articulating a clear scientific basis for this expansion. Even more interesting, they excluded the most significant Atlantic salmon river in the United States, the Penobscot River, which sits in the middle of the geographic range they identified. This "gerrymandered" DPS determination makes no sense and is a far cry from the "sparing" use Congress intended to be based on a positive biological foundation.

Requirement that the Services develop clear, scientifically supported standards through a public rulemaking process makes eminent sense.

b. Independent Scientific Peer Review

The ESA is supposed to be based upon sound science. Independent peer review assures that administrative decisions will conform to the best science available. In the case of Maine Atlantic salmon, however, the agencies are "shooting first and asking questions later." And, the agencies themselves serve as advocates as well as decision makers.

There is considerable scientific dispute and uncertainty about the genetic basis for determination that Maine Atlantic salmon constitute a DPS. The 1999 listing proposal is based primarily upon one single genetic study that has never been subjected to independent scientific peer review and which, by its own terms, does not clearly support the conclusion that Atlantic salmon in Maine constitutes a separate DPS. An earlier study in 1997 by the same scientist was peer reviewed, and most of the reviews were critical or non supportive. This uncertainty is further compounded by the fact that (1) other reputable scientists which have studied the situation have come to an opposite conclusion, and (2) some key scientific and genetic work relevant to this

determination has not yet been finished. Moreover, the scientific analysis in the biological status review fails to adequately address and resolve other scientific questions which merit some prior independent peer review. Ironically, at the same time the Services are moving toward a listing, the National Marine Fisheries Service has funded a two-year study that has direct relevance to the genetic basis for the DPS determination.

All of this points to the need to require as a prerequisite to listing clear and substantial evidence that is corroborated by an independent peer review before a listing is imposed. The ESA should not serve as a basis to "list first" and "ask questions later" when so much is at stake. And in our case, we are not in an emergency situation. The Services themselves are on record as strongly opposing an emergency listing and have said so unequivocally in their papers filed in federal court. For me, this highlights even more the need for Congress to be clear, as H.R. 3160 would suggest, that there be a solid scientific foundation before a listing is initiated and certainly before a listing is imposed.

c. Mandatory Disclosure of Data and Information

The foundation for good science, as well as fair process, is open access to information. Without free and open access, those interested in any way in a listing cannot adequately test the scientific basis nor prepare or present their case before the agency or in subsequent reviews.

In our case, for over three months the State sought information directly relevant to the 1999 scientific study upon which the Services rely to establish a DPS. Much of it is the same kind of data that was made publicly available in connection with an earlier (1997) study. Even after we filed a formal Freedom of Information Act request, we had difficulty getting a complete and accurate copy of the data. Over one month after our FOIA request, the Department of Interior delivered computerized data that was not useable. Several weeks later, an additional set of data was furnished, but his time without necessary files to evaluate it. Shortly thereafter, because the clock was ticking down on our time to file comments, the State of Maine felt it necessary to file a federal lawsuit to compel the production of data and extend the comment period. The Department of Interior appears to have now produced the data (although we are currently verifying this) and the Court extended the comment period to allow time to review the data.

In response to a second FOIA request seeking access to information relied upon in reaching the listing proposal, the Department of Interior is withholding, on the basis of privilege, over 250 documents we have requested. These are documents within the scope of our FOIA request and which may be relevant to the issues before the agency in the listing proceeding.

This is not right. A public agency should not be liberally invoking legalistic excuses for withholding information to any citizen, let alone another public and sovereign entity where that information is relevant to rights being determined in an underlying administrative listing proceeding. I can tell you that that it is certainly not the way we play the game in Maine. It should not be the way your federal agencies play that game, and H.R. 3160 would level the playing field in that respect.

d. Support for State Conservation Plans.

Mandatory consideration of future conservation benefits of conservation agreements could provide crucial congressional support to agreements like the Maine Conservation Plan. This would strengthen such agreements against judicial attack and provide much needed flexibility to the ESA. Attacks on state conservation plans like Maine and Oregon's is, in my view, shortsighted. The hallmark of these plans is support across a broad spectrum of constituencies, and that support is vital in order to carry out the kind of

broad-based habitat protections and improvements that support restoration of the salmon. This kind of "voluntary" cooperation is particularly vital in states like Maine where the majority of the habitat is privately owned, unlike the situation in many west coast states where the majority of the property is under federal ownership and control. In a circumstance like Maine's, it is shortsighted to believe that a command and control process driven from Washington, D.C., can provide more effective management than the type of locally based system that the Maine Conservation Plan represents.

e. Justification by the Secretary and the President When a Governor Objects; Provision for De Novo Judicial Review.

Under law, courts give great deference to decisions of administrative agencies. While this doctrine has merit in many circumstances, its use in the administration of the ESA in particular, which has been called one of the most powerful pieces of legislation in the country, has engendered distrust, division, and suspicion among many. Additional measures of accountability, such as these two measures, will help to alleviate the concern that administrative agencies can take actions with minimal or no scientific justification. The requirements of written justification, presidential approval and de novo judicial review would restore some balance to the process and require agency staff to sharpen their scientific analysis in order that it be persuasive and solidly based.

I want to conclude my remarks by again emphasizing that I am far from a radical, anti-environmental, anti-conservation Governor. On the contrary, I take pride in the many environmental achievements my administration has accomplished over the last five years. This is consistent with a strong conservation ethic in Maine. But strong conservation programs and laws do not require processes that are arbitrary and fundamentally violative of the basic principles of due process and fundamental fairness. H.R. 3160 appears to me to be a vehicle which addresses these concerns and will actually strengthen the ESA by limiting the potential for its abuse thereby insuring its continued public support.

I hope these comments are helpful to the Committee in its deliberations.

Sincerely,

Angus S. King, Jr. Governor

cc: Senator Olympia J. Snowe
Senator Susan M. Collins

Congressman John E. Baldacci

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